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January 12, 1999

D. P. U. 97-74

Appeal of Lois Strucek from a decision of the Director of the Department's Transportation Division denying her application for renewal of her school bus driver certificate.

APPEARANCES: Lee D. Flourney, Esq.

Cain, Hibbard, Myers & Cook, P.C.

66 West Street

Pittsfield, Massachusetts 01201

FOR: LOIS STRUCEK

Appellant

Selma Urman, Esq.

Department of Public Utilities

100 Cambridge Street

Boston, Massachusetts 02202

FOR: DEPARTMENT OF PUBLIC UTILITIES

Appellee

I. INTRODUCTION

On July 8, 1997, pursuant to the provisions of G.L. c. 25, ' 12F, Lois Strucek ("Appellant") filed an appeal to the Commission of the Department of Public Utilities (now, Department of Telecommunications and Energy or "Department"), of the refusal of the Director of the Department's Transportation Division ("Director" or "Appellee"), in a

June 18, 1997 letter, to issue to her a school bus driver certificate (Exh. DPU-4). After proper notice, a hearing was held at the Department's offices on August 12, 1997. At the hearing, the Appellant testified on her own behalf. The Department supported the decision of the Director, and presented one witness, Andrew M. Padellaro, an attorney with the Driver Control Unit of the Registry of Motor Vehicles ("Registry" or ARMV®). The Appellant entered six exhibits into the record. The Department also entered six exhibits into the record.

II. SUMMARY OF THE ISSUES

The issue on appeal is the refusal of the Director to issue a school bus driver certificate to the Appellant after court disposition, pursuant to G.L. c. 90, ' 24E, of the charge of operating a motor vehicle under the influence of alcohol (AQUI®).

The Appellant argues that the Director's refusal is based on misapplication of the

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law and regulations governing renewal of school bus driver certificates, and on misconstruction of the law governing the court's disposition of the charges against the Appellant.

III. SUMMARY OF THE FACTS

On July 8, 1996, the Appellant was arraigned in Central Berkshire District Court ("Court") on a charge of operating her passenger vehicle, on July 5, 1996, under the influence of alcohol, and of leaving the scene of an accident after causing property damage (Exh. Appellant-2). After the accident, the Appellant agreed to a breath test which registered a result of .10% blood alcohol content ("B.A.C.") (Exh. Appellant-5). At her arraignment, the Appellant admitted to facts sufficient to warrant a guilty finding, and consented to participation in an alcohol education treatment program (Exh. Appellant-2). The Appellant's license to drive a passenger vehicle was suspended for forty-five days (id.). The Appellant availed herself of a second blood alcohol test which produced a reading of less than .08% B.A.C. On July 25, 1996, based on the second test reading of less than .08% B.A.C., the Pittsfield Division of the District Court overturned the suspension of the Appellant's license to operate her motor vehicle (Exh. Appellant-3).

On October 26, 1996, in the course of the usual procedure for renewing school bus driver certificates, the Director received a copy of the Appellant's Criminal Offender Record Information ("CORI") (Exh. DPU-1). The CORI noted that the Appellant's court case had been continued without a finding, and that her license to operate her passenger vehicle had been suspended. On October 29, 1996, the Director wrote to the Appellant, advising her that based on the information in her CORI, her authority to drive a school bus was suspended (Exh. Appellant-1).

On March 3, 1997, the Appellant petitioned for an adjudication of the refusal to reissue the certificate. The Department scheduled a hearing for March 26, 1997 (Exhs. DPU-2-3). The Appellant requested that the Department postpone the hearing explaining that the Appellant anticipated dismissal of the charges so that a hearing may not be necessary to adjudicate the reissuing of the certificate. On April 24, 1997, based on the fact that the Appellant successfully completed the 40 Hour Driver Alcohol Education Program on December 23, 1996, the Appellant's case was dismissed (Exhs. Appellant-2-5). Significantly, the court record noted that the disposition was pursuant to G.L. c. 90, ' 24E (id.). The Department reviewed the dismissal documents, and the Director, in a June 18, 1997 letter advised the Appellant that, based on the disposition of the case as set forth in the documents provided by the Appellant, the Department could not issue a school bus driver certificate to the Appellant for a period of five years (Exh. DPU-4).

III. STANDARD OF REVIEW

The penalty for persons convicted of operating a motor vehicle while under the influence of intoxicating liquor is set forth in G.L. c. 90, ' 24. Section 24 states, inter alia, that:

A prosecution commenced under the provisions [of Section 24] shall not be placed on file or continued without a finding except for dispositions under section twenty-four D [of chapter ninety]. (Emphasis supplied)

The disposition provided pursuant to G.L. c. 90 ' 24D (ASection 24D@) requires that:

Any person convicted of or charged with operating motor vehicle while under the influence of intoxicating liquor, may, if he consents, be placed on probation for not more than two years and shall, as a condition of probation be assigned to a driver alcohol education program as provided herein...

The dismissal of charges upon compliance with the terms of section 24D is provided in

G.L. c. 90, ' 24E (ASection 24E@):

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The provision of this section shall apply to any person convicted of or charged with operating a motor vehicle while under the influence of intoxicating liquor provided said person is qualified for a disposition under section twenty-fourD...

In order to qualify for a disposition under [Section 24E], a person shall, in the judgment of the court, have cooperated fully with the investigation as described in section twenty-four D and shall be and have been in full compliance with such order as the court may have made for a one year term of probation as provided therein, including participation in such driver alcohol education programs...as the court may have ordered.

...If the judge finds that the person is satisfactorily complying with the conditions

of probation, the judge may enter a dismissal of the charges...

The impact of Sections 24, 24D, and 24E on the issuing or renewing of a certificate to drive a school bus is explained in G.L. c. 90, ' 8A (ASection 8A@ or A' 8A@). Section 8A governs the certification of school bus drivers. At the present time, although the authority of the Registry to issue school bus driver certificates is found at ' 8A, and the general authority of the Department to issue certificates including a school bus driver certificate is found at

G.L. c. 159A, ' 9 (ASection 9" or A' 9") and the Department=s regulations at 220 C.M.R.

' 155.02, the Department, pursuant to a Memorandum of Understanding(AMOU@)7 between the Department and the Registry, is the sole agency issuing original and annually renewing school bus driver certificates. The MOU specifies that the requirements of Section 8A must be satisfied for the Department to issue the certificate (Exh. DPU-3)8. Section 155.02(10)9 of 220 C.M.R. confirms the use by the Department of the requirements of Section 8A. Section 8A specifically disqualifies an applicant for a school bus driver=s certificate who has been convicted within the preceding five years of operating a motor vehicle while under the influence of intoxicating liquor. Section 8A expands the disqualification based on OUI by stating that any person who has consented to have a case disposed of under the provision of Section 24 D, that is, consented to a @continued without a finding@ disposition, shall, for the purposes of holding a school bus driver=s certificate, be deemed to have been convicted.

IV. POSITIONS OF THE PARTIES

A. Appellant

The Appellant argues that the Director is in error in refusing to renew or reissue her school bus driver=s certificate. The Appellant relies on three contentions. The first contention is that an existing license creates a property interest, and therefore the requirements for renewals are more relaxed and more protective of an existing certificate holder whether a renewal is issued pursuant to Section 9 or Section 8A (Tr. at 14, 20, 23). The Appellant believes that Section 8A applies to conviction for enumerated offenses only on an original application, but does not prevent the Department from renewing an existing certificate on the grounds of character or criminal record (Tr. at 22). The second contention is that under Section 9 and the Department=s regulations, the Department may revoke, suspend or not renew an existing license only after a hearing at which Agood cause@ for the suspension, revocation or decision not to renew is shown (Tr. at 9). The Appellant argues that her license was suspended and not renewed prior to the time a hearing was scheduled (Exh. DPU-2). The Appellant=s final contention is that the Department misinterprets the intent of G.L. c. 90 ' 24E (Tr. at 14, 21-23).

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The Appellant takes the position that Section 8A is, in significant part, a penal statute, and cannot apply to a disposition under G.L. c. 90, § 24E (Tr. at 14-16). The Court dismissed the appellant's case pursuant to G.L. c. 90, § 24E. However, the Appellant argues that Section 24E operates independently of Section 24D's Acontinued without a finding@ disposition, and that any contrary action misinterprets legislative intent (Tr. at 14). According to the Appellant, the legislative intent of Section 24E is to preclude persons, who have been found guilty of OUI but have been allowed to take the driver alcohol program, from claiming that because they were permitted into the education program, they should be exempt from the five year exclusion from driving a school bus (Tr. at 14). The Appellant contends that her participation in the Section 24D driver alcohol education program was voluntary on her part because the results of the second blood test demonstrated that she was not guilty of driving under the influence of alcohol, and the suspension of her license was overturned (Exh. Appellant-3, Tr. at 8, infra. at 2). The Appellant believes that because of the subsequent dismissal of her case on April 24, 1997, the continued without a finding disposition of Section 24D is not applicable, and the Director should reissue the school bus driver certificate

(Tr. at 15-17)

B. Appellee/Department

The Department's position is that the refusal of the Director to reissue the Appellant's certificate is mandated by Section 8A. The Department argues that the refusal is mandated whether the requirements of Section 8A are applied by the Department through the delegation in the MOU, or through the application of the Department's own Regulations at

200 C. M. R. § 155.02.

At the hearing, the Department's witness, Andrew Padellaro testified that, as a Registry counsel, ninety percent of his duties deal with drunk driving legislation and policy, and that he is very familiar with G.L. c. 90, §§ 24, 24D, and 24E (Tr. at 47-48). Mr. Padellaro testified that Section 24E allows a case to be dismissed only if the conditions attached to a continuance under Section 24D have been satisfied (Tr. at 55-59). The Department's position is that the Appellant's case was continued pursuant to the provisions of Section 24D, and was dismissed under Section 24E upon satisfaction of the requirements imposed by Section 24D. The requirement imposed by G.L. c. 90, § 8A on school bus drivers, that a disposition of "continued without a finding" be considered a conviction, constrains the Department from issuing a school bus driver certificate for five years.

V. ANALYSIS AND FINDINGS

The Department is not persuaded by the arguments of the Appellant that the Director erred in refusing to issue the school bus driver certificate.

It is well settled that under Massachusetts law that a license to operate a motor vehicle is not a property right but a conditional privilege. *Wall v. King*, 109 F. Supp. 198, aff'd 206 F.2d 878 (1953), cert. denied 346 U.S. 915, 74 S.Ct. 275 (1953). Furthermore, the Massachusetts statute at G.L. c. 90, § 24, which provides for administrative revocation of a driver's license, has the nonpunitive, nonretributive purpose of protecting public safety through prompt removal of drunk drivers from highways. *Leduc v. Commonwealth*, 659 N.E.2d 755, 421 Mass. 433 (1995). Since there is no question of the right to revoke the conditional privilege of operating under a license from the RMV, it follows that a certificate dependent on the conditional privilege of holding a valid motor vehicle license cannot be regarded as an entitlement, and is subject to revocation and non-renewal. The Department's regulations at 220 C.M.R. § 155.02(10)(a) stipulate that if a license is suspended by the RMV, a bus driver's certificate shall be returned immediately to the Department.

Likewise, the Department finds nothing in either Section 9 or Section 8A that

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requires more relaxed requirements for a renewal than are applied for an original certificate. The Appellant's insistence that the second paragraph of Section 8A specifies a lesser requirement for renewals is mistaken. The paragraph notes only the difference in the driver training course for new drivers and the annual in-service training course for experienced drivers renewing certificates (Tr. at 89). 10

The Appellant argues that the Department can act only under Section 9, and can only suspend, revoke or refuse to reissue a certificate, after a hearing for "good cause shown". The Appellant contends that she was not afforded a hearing prior to the instant proceeding, and that instant proceeding will fail to demonstrate any "good cause" (Tr. at 19). The Appellant misconstrues both claims. The Director met with the Appellant on April 7, 1997, to examine the facts of the Appellant's case. Based on the April 10, 1997 letter that followed that meeting the Appellant filed this appeal (Exh. DPU-2). The Appellant, admitted in Court, to facts sufficient to warrant a finding of guilty to the charge of OUI. The Appellant testified to those facts at the hearing in this proceeding. Based on that admission, the Department believes that "good cause" has been shown to refuse to issue the certificate.

The Appellant contends that even if the Department is properly exercising authority pursuant to Section 8A, the CORI requirements are not applicable to renewals because the Registrar, after a finding of good moral character in an applicant for an original certificate, is not required "to impose any particular prohibition on the grounds of character or criminal record" for renewals (Tr. at 20, 22). Such a conclusion is inconsistent with the beneficial purpose of Section 8A, which is to safeguard children traveling to and from school. Indeed, the Department has held, in a similar certification proceeding, that school children are entitled to protection regardless of the agency issuing certificates. Appeal of Raymond G. Granger, D.P.U. 91-210 (1993).

The Appellant's final argument is that the dismissal of the Appellant's case pursuant to G.L. 90, ' 24E is a disposition independent of G.L. c. 90, ' 24D. The Appellant argues that under her view of the legislative intent of Section 24E (infra at 6) only persons found guilty of driving under the influence of alcohol are excluded from driving a school bus for five years (Tr. at 14). The Appellant contends that, based on the second blood test, the suspension of the passenger license was overturned; she was not found AgUILty@; and Section 24D is not applicable to her disposition under Section 24E. The Department does not concur.

It is axiomatic that statutory interpretation is for the courts. However, courts, when faced with unambiguous construction agree that the agency charged with the administration of the statute may appropriately apply statutory interpretation. The testimony of the RMV witness does not support the Appellant's interpretation of Section 24, and specifically Sections 24D and 24E. The RMV witness testified that in interpreting the relationship among these Sections the RMV concludes that the Legislature intended an integrated procedure for the disposition under Section 24E of an OUI charge on satisfactory completion of the probationary requirement, alcohol program and minimum license suspension requirements of Section 24D. The witness testified that his interpretation is consistent with the plain meaning of the statutes, and also with a basic rule of statutory construction. The meaning and the rule require that where two or more statutes relate to the same subject matter, they should be construed together so as to constitute an harmonious whole consistent with the legislative purpose. Registry of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds, 382 Mass. 580, 585 (1981). (Tr. at 50-59; Exh. DPU-5) The Department concludes that the plain wording of the statute conveys the remedy intended by the Legislature.

As noted infra, Section 24D uses the words, "Any person ... charged with operating..., may if he consents, be placed on probation...". Section 24E provides that "that section shall apply to any person... charged with operating... qualified for a disposition under Section 24D". The Appellant admitted to sufficient facts to allow for a Section 24D disposition of continued without a finding, and the Court record so states. The Appellant consented to the provisions of Section 24D.

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Furthermore, the Appellant testified concerning the liquor that she had consumed, and to the results of the sobriety tests (Tr. at 29-30, 33-35, 39; Exhs.

Appellant 5-6). On July 25, 1996, the Court overturned the suspension of the motor vehicle operator's license, based on the second blood alcohol test. The blood alcohol levels of G.L. c. 90, § 24(1)(e), establish presumptions (infra. at 2, n. 3). The presumption of not being under the influence of alcohol was negated by the Appellant's own admissions. Further, the Court, in July 1996, did not find the Appellant "not guilty." The overturning of the suspension of the passenger vehicle license was not the equivalent of a "not guilty" finding. The Appellant continued as a consenting probationer under the provisions of Section 24D, until the disposition pursuant to Section 24E on April 24, 1997. The Court had no knowledge of the Appellant's employment as a school bus driver. Therefore, the Court took no notice of the provisions of Section 8A during the original arraignment on July 8, 1996, or at the hearing that overturned the passenger license suspension on July 25, 1996, or at the April 24, 1997 dismissal pursuant to Section 24E. The Department concludes that, although a school bus driver must hold a valid RMV passenger license to hold a school bus driver certificate, the RMV license is a threshold requirement to the satisfaction of the Section 8A requirements. The overturning of the suspension of the Appellant's passenger vehicle license does not, ipso facto, entitle the Appellant to hold a school bus driver certificate. The plain meaning of Section 8A's statement that a continued without a finding is deemed a conviction, enjoins the Department from issuing a school bus driver certificate to the Appellant until July 2001.

The Department finds that the Director was correct in his refusal to issue or renew a school bus driver certificate to the Appellant.

VI. ORDER

Accordingly, after due notice, hearing, and consideration it is

ORDERED: That the appeal of Lois Strucek from the decision of the Director of the Transportation Division, refusing to renew her application for a school bus driver certificate, be and is hereby DENIED.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).